The Significance of the Convention on Offences Relating to Cultural Property 2017

Janet Ulph[1] and Sophie Vigneron[2]

ORCID

Janet Ulph ORCID https://orcid.org/0000-0002-4939-6419

Sophie Vigneron ORCID https://orcid.org/0000-0002-8667-4406

Abstract

This chapter analyses the context of the Convention on Offences Relating to Cultural Property that was drafted under the aegis of the Council of Europe and adopted in 2017. It provides an exposition of its key provisions that follow the journey of trafficked cultural objects from theft/illegal excavation in the country of origin to their acquisition in the country of destination. The chapter discusses why the 2017 Convention has attracted little interest to date, reflecting upon whether any of its requirements would pose difficulties for the UK which has not yet ratified it.

Introduction

The Council of Europe Convention on Offences Relating to Cultural Property, which was adopted in Nicosia (Cyprus) on 3 May 2017, is the first convention in the 21st century to consider afresh the question of protecting cultural property. Its Preamble explains that cultural property deserves special protection because it provides 'a unique and important testimony of the culture and identity' of people. Its Explanatory Report adds that, 'Throughout human history, cultural property has constituted one of the basic elements of local and national cultures, leading to the creation of a more peaceful, just and cohesive society.' The Convention therefore encourages each nation to protect its own cultural property and that of others. It provides a gentle reminder that cultural objects have a value which transcends mere monetary calculations.

The Preamble to the Convention expressed concern that 'offences related to cultural property are growing and that such offences, to an increasing extent, are leading to the destruction of the world's cultural heritage.' The UN Economic and Social Council suggested in 2004 that the international trade in looted, stolen or illicit cultural objects was estimated at several billion United States dollars per year (UN ECOSOC, Resolution 34, 2004). However, some caution is needed in viewing any estimate because the true level of trafficking in cultural property is unknown; criminals may escape undetected and the reporting of this particular type of crime by governments to Interpol can be poor (Passas & Bowman, 2011). Even so, an Interpol survey in 2020, based upon information provided by 72 countries, concluded that cultural property crime had increased during the pandemic and noted that, in 2020, 854,742 cultural objects were seized worldwide (Interpol, 2021).

The Preamble continued by stating that it was agreed to create the Convention:

Commented [AA1]: In APA 7th edition, page number is not required within in-text citations unless using a direct quote from a source.

[1] Janet Ulph, University of Leicester, Leicester Law School, ju13@le.ac.uk

[2] Sophie Vigneron, University of Kent, Kent Law School, s.vigneron@kent.ac.uk

> Considering that unlawfully excavated and illicitly exported or imported cultural property is increasingly being sold in many different ways, including through antique shops and auction houses, and over the internet;
>
> Considering that organised crime is involved in the trafficking of cultural property;
>
> Concerned that terrorist groups are involved in the deliberate destruction of cultural heritage and use the illicit trade of cultural property as a source of financing.

These statements are uncontroversial. It is well known that unscrupulous dealers have played a key role in trafficking cultural objects. Local people in source countries will often be paid very little in return for stealing works of art or excavating antiquities but the price of each item may increase dramatically as they are transferred by dealers from one to another. One guide published by UNESCO estimated that '98% of the final market price of an object remains in the pocket of middlemen' (UNESCO, 2013, p. 3).

It has been recognised for many years that organised criminal syndicates have been involved in trafficking antiquities (Renfrew, 2000; Brodie & Tubb, 2002). The art market has features that allow for the development of transnational organised crime: it is highly specialised, global, lucrative, opaque and discreet (UNODC, 2010, para 10). Trafficking is not confined to a few vulnerable countries. There are global networks of criminals from supply (looting) to demand (collecting) (Mackenzie & Davis, 2014). Some may specialise to an extent, such as by looting antiquities in the Middle East and establishing transport routes to Europe and the United States. However, many criminals are opportunistic and will adapt to new demands, such as for jade objects. There is a danger that huge profits made from one type of crime will be invested in other criminal activities such as drugs or people smuggling, or in terrorist acts. These considerations explain why it is desirable for every nation to try to prevent the trafficking of cultural objects from one area to another.

The Convention is intended to set certain standards in domestic criminal law with which governments should comply to address the trafficking in cultural property. Paragraph 31 of the Explanatory Report provides a context for this strategy:

> The transnational nature of illicit activities is due to the fact that experienced thieves and smugglers are well aware of the legal differences between countries and seek to exploit gaps or weaknesses in the law to increase profits from their wrongdoing and lower their chances of being caught. This is demonstrated by the fact that stolen or illicitly excavated artefacts are frequently moved to countries where they can easily be concealed from customs and border officials, where tainted titles can be laundered (for instance, through norms protecting good faith purchasers or the expiry of limitation periods), and then sold, either to private individuals or institutional collectors, or to established art trade companies, such as art dealers or private galleries.

The Convention therefore sets out specific offences which must be created by State Parties (if they do not already exist in their domestic laws) which would target not only thieves and looters but also those who market stolen and looted objects.

The Convention builds upon four key international conventions. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, and its 1954 and 1999 Protocols, focuses upon looting and destruction of cultural objects during situations of armed conflict. The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage concentrates on the preservation of heritage sites. The 1970 Convention on

the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property takes a holistic approach towards combating the illicit trade in art and antiquities; it calls for concrete measures such as export controls while at the same time emphasising the importance of educational programmes to raise public awareness of the value of cultural property and the need to develop ethical codes for museums and the art trade. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects adopted in 1995 provides uniform rules to support civil recovery of stolen or looted cultural property. The 2017 Nicosia Convention also builds on European instruments regarding the export and import of cultural property, in particular the EU Directive 2014/60 that facilitates the return of illegally exported cultural objects, and the EU Regulation 116/2009 on the export of cultural goods. However, a shortcoming of these instruments is that they did not generally contain criminal law provisions that would punish the trafficking of cultural property. Admittedly the 1999 Second Hague Protocol does contain criminal law provisions, but they focus on armed conflict and apply only to heritage assets of the greatest importance. The 1970 UNESCO and 1995 UNIDROIT Conventions focus on preventive measures and procedures of restitution in civil claims (Committee on Offences Relating to Cultural Property, 2016, pp. 8-9). Hence, the Nicosia Convention fills an important gap because there has been no international convention focusing on an array of core criminal offences which deter looting and trafficking of cultural property (Borgstede, 2014).

In the 21st century, conflicts in the Middle East, Mali and Yugoslavia, have exacerbated fears regarding the safety of heritage objects. Traffickers have taken advantage of wars and civil unrest to arrange illegal excavations and thefts from museums and private residences. There has been growing awareness that criminal laws might play a valuable role as a deterrent. This is evidenced by international initiatives such as the UN Convention against Transnational Organized Crime 2000 ('UNTOC'), the 2014 International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property (hereafter the International Guidelines) and Resolution 10/7 Combating Transnational Organized Crime against Cultural Property.

The 2017 Convention fills an important gap in international criminal cooperation as foreign criminal laws are normally non-justiciable by the judge of the forum. There is a well known principle of private international law that 'English courts have no jurisdiction to entertain an action … For the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State' (Collins, 2012). The rationale behind the non-justiciability of foreign public law rule is that jurisdictions of one country should not act to the benefit of another sovereign. International and regional conventions, as well as bilateral agreements aim to address this issue by recognising a foreign state's interest in the criminalization of certain acts. Thus, an international convention can strengthen cooperation and avoid gaps, divergences, and loopholes between countries.

Article 1 of the 2017 Convention declares that its aims are to promote national and international cooperation to prevent damage, destruction, or trafficking of cultural property. Yet, although it is widely recognised that nations must work together to combat cultural property crime, the 2017 Convention has not proved popular so far. It has been signed by thirteen countries and ratified by six: Cyprus, Greece, Hungary, Italy, Latvia and Mexico (the latter is not a Member of the Council of Europe). It entered into force in April 2022.[3] This chapter analyses the

[3] At the time of writing, it had been signed by: Armenia, Cyprus, Greece, Hungary, Italy, Latvia, Mexico, Montenegro, Portugal, the Russian Federation, San Marino, Slovenia, Ukraine.

drafting context of the Convention and provides an exposition of its key provisions that follow the journey of trafficked cultural objects from theft/illegal excavation in the country of origin to their acquisition in the country of destination. The chapter discusses why the 2017 Convention has attracted little interest to date, reflecting upon whether any of its requirements would pose difficulties for the UK which has not yet ratified it.

Drafting context

The Delphi Convention

The 2017 Convention is a revision of the Convention on Offences relating to Cultural Property adopted in Delphi on 23 June 1985 and known as the Delphi Convention, which was signed by six countries (Cyprus, Greece, Italy, Liechtenstein, Portugal, Turkey), ratified by none, and never came into force. The Delphi Convention emphasised the need to protect cultural property but failed to properly address certain issues (Roucounas, 1984). In particular, the drafters had difficulties in finding common ground between States which export cultural property and those which import or transit such property. As a compromise, the Delphi Convention emphasised international cooperation but neither set standards nor defined substantive criminal law principles.

Several reasons have been advanced to explain why the Delphi Convention was unpopular (Committee on Offences Relating to Cultural Property, 2016, p. 7). Firstly, its formulation was vague. The appendices to the Convention listed criminal offences but certain offences were uncertain in scope. The meaning of the offence of 'appropriating cultural property with violence or the use of threats' was unclear not least because the distinction between violence and use of threats was blurred. Secondly, the implementation of the Convention was *à la carte* rather than homogenous. Criminal categories were deliberately reduced to a minimum because there was a fear that governments would only ratify international conventions when they were similar to their domestic laws (Roucounas, 1984). Yet governments were given the power to enlarge the categories of offences. The Convention did not contain a unique definition of cultural property but instead gave States considerable freedom to add further offences to those included in the first section of Appendix III (which listed core offences). Any exercise of this power risked limiting inter-State cooperation. Third, there were some surprising omissions in Appendix III, regarding the destruction or damage of cultural property, the illicit excavation of archaeological objects and the illicit exportation of cultural property.

International instruments criminalising trafficking

Since 2000, UNODC and UNSCR have adopted several instruments which encourage the criminalisation of trafficking in cultural property. For example, UNODC has adopted certain instruments to strengthen the implementation of the United Nations Convention against Transnational Organized Crime 2000 ('UNTOC') in relation to the protection of cultural property. The key aspects of UNTOC are that State Parties must create domestic criminal offences that include participation in an organised criminal group, that State Parties must adopt measures that facilitate international cooperation such as extradition, mutual legal assistance (e.g., taking statements, executing searches, executing seizures, providing information) and law enforcement, and that State Parties must adopt measures that will facilitate capacity building (Borgestede, 2014). In Annex 1, an organised group is defined as three or more people who act in concert to commit a crime, and a serious crime is defined as one which is punishable by a minimum of four years imprisonment. UNTOC is wide in scope but it cannot be effective if looting and trafficking are not criminalised at a domestic level. It is therefore a matter for concern that a survey has shown that its definition of serious crime (four years imprisonment)

was not supported by domestic laws when looking at the different stages of trafficking (Borgstede, 2014).

The UN adopted the 2014 International Guidelines in support of UNTOC (UN Resolution 69/196, 2014). The Guidelines aim to support states in the 'development and strengthening of their criminal justice policies, strategies, legislation and cooperation mechanism' in relation to combating trafficking in cultural property. They contain chapters on developing strategies to prevent crime, adopting criminal justice policies, and supporting international cooperation. Thus Guideline 16 encourages states to criminalize as serious offences the different stages in the trafficking in cultural property: looting, illicit excavation and theft; illicit import and export; participation in an organised criminal group for trafficking in cultural property and laundering of such property. Guideline 17 encourages states to criminalise the damaging or vandalizing of cultural property (UNODC, 2016). In 2020, UNODC adopted Resolution 10/7 that reiterated the need to fight the trafficking in cultural property and supported these Guidelines.

The UN Security Council has adopted resolutions that condemn the trafficking of cultural property. Whereas initial instruments discussed looting and theft of cultural property of specific countries such as Iraq (Resolution 1483, 2003) or Mali (Resolution 2085, 2012; Resolution 2100, 2013), the most recent ones refer more broadly to threats to international peace and security (Resolution 2199, 2015; Resolution 2322, 2016; Resolution 2347, 2017; Resolution 2597, 2021). For example, Resolution 2322 'urges States to develop … broad law enforcement and judicial cooperation in preventing and combating all forms and aspects of trafficking in cultural property and related offences that … may benefit … terrorist groups, and to introduce effective national measures … to prevent and combat trafficking' (2016).

This connection to peace and security contributes to a greater recognition of the importance of heritage and the values attributed to it, thus reinforcing the way in which conventions are interpreted and new norms are constructed. The development of international instruments and resolutions provides evidence of a growing international awareness of the consequences of the trafficking in cultural property. These resolutions, guidelines and tools reinforce each other and emphasise that it is important for each State to adopt domestic measures that will protect cultural property. The Nicosia Convention builds upon these recent efforts. It requires State Parties to ensure that they have core criminal offences in place to deter the destruction and trafficking in cultural property. It encourages international cooperation because offences committed in one state are recognised as criminal offences in another.

Critical analysis

Trafficking of a cultural object starts from a country of origin or source country, then moves through one or several countries to a destination country or market country (Mackenzie & Yates, 2020; Mackenzie & Davis, 2014). Campbell argues that there are four stages in a trafficking network from manual labour to collector (Campbell, 2013). The first stage is the initial theft or illicit excavation that might be accompanied by destruction of surrounding property in the country of origin. Second, early stage intermediaries transport the object from the country of origin to a transit country. Third, late stage intermediaries become involved in laundering the object and facilitating its transport and sale in countries that will recognise a valid transfer of title to a purchaser (which is the case in most of continental Europe[4]). The

[4] For example, the French rule of a valid transfer of property by adverse possession, found in section 2276 of the Civil code, gives the good faith possessor an immediate ownership title at the time of sale. However, the original

final stage is the purchase by a museum or a collector at a reputable gallery or auction house in the destination country; more often than not, this is a European country or the Unites States of America (Interpol, 2021).

The more advanced the stage, the more specialised the intermediary and the more profit is to be made; and the less deterrent there is. In particular, as various countries have domestic laws which protect purchasers by giving them a good title to the object, it may be very difficult to prosecute a late stage intermediary. Campbell argues that the trade is criminal and organized because 'each participant is cognizant that they are stealing or purchasing stolen items, with the possible exception of some collectors, and participants are interacting with the sole purpose of facilitating at least two crimes personally, since each stage has a crime at either interface… [E]ach individual is performing a role that conspires to commit at a minimum, theft, transnational smuggling, fraud, and laundering over the course of the network' (2013, p. 134).

The 2017 Convention aims to criminalize each stage, because it is ineffective to criminalize only at the level of the country of origin. If there is a demand in the country of destination, there will be supply in the country of origin. Hence, the Convention requests State Parties to create the following main offences, when they do not exist: theft and other forms of unlawful appropriation, unlawful excavation and removal, illegal export and import, acquisition, placing on the market and falsification of documents. Some acts can take place at the first stage of trafficking only, like theft or unlawful excavation, but others can take place along the chain of trafficking such as reselling between early and late intermediaries and then exporting/importing from transit countries to the final destination country. Each of the main articles is analysed in turn with a brief discussion of the possible impact on English law if the UK Government were to ratify the Convention.

Article 2 – scope and use of terms

Article 2 is important in defining the scope of the Convention. Thus Article 2(1) states that it applies 'to the prevention, investigation, and prosecution of the criminal offences referred to in this Convention' relating to movable and immovable cultural property. The Convention does not include money laundering measures in the list which follows but concentrates on the core criminal offences.

Article 2(2) defines the term 'cultural property.' Its drafters have opted for a well established distinction between movable and immovable cultural property that follows almost verbatim the 1970 Convention and the 1972 World Heritage Convention. However, it widens the definition to include underwater movable and immovable heritage, thereby extending it to cultural objects covered in the 2001 Convention on the Protection of the Underwater Cultural Heritage. Article 2(2)(a) sets three cumulative criteria to define movable cultural property that follow the 1970 Convention and the EU Directive 2014/60: 1) the object is situated or has been removed from land or underwater; and 2) it has been, on religious or secular grounds, classified or defined (terms used in the 2014/60 Directive), or specifically designated by a party to the Nicosia Convention or any party to the 1970 Convention; and 3) falls within one of the eleven categories listed in the 1970 Convention.

owner can claim for the restitution of his/her stolen object for a period of three years after the theft. This time limitation is extremely short.

As regards immovable property, Article 2(2)(b) provides that this includes any monument, group of buildings, site or structure on land (which is borrowed from the 1972 Convention) or underwater (2001 Convention). Further, this property must be, on religious or secular grounds, defined or specifically designated by a State Party to the Nicosia Convention or the 1970 Convention or listed on the World Heritage List according to the 1972 Convention.

The definition of cultural property adopted by Article 2 builds on previous conventions but restricts the scope of its application to cultural property that has been listed by a state. This means that domestic laws must set the criteria to judge the importance of objects for archaeology, prehistory, ethnology, history, literature, art or science. In support of Article 2, Article 20(a) requires State Parties to establish and maintain up to date inventories or databases of its cultural property which is a requirement also found in Article 5(b) of the 1970 Convention (Vigneron, forthcoming). It means that the protection afforded by the Convention is similar to the protection afforded at the domestic level. However, if there is no protection at the domestic level, because it has not been classified, there is no protection at the international level.

Article 3 – theft and other forms of unlawful appropriation

Article 3 tackles the conduct of the main perpetrators of cultural property crime by requiring State Parties to 'ensure that the offence of theft and other forms of unlawful appropriation as set out in their domestic criminal law apply to movable cultural property.'

Most countries will have made theft a criminal offence. In England and Wales, section 1(1) of the Theft Act 1968 states: 'A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.' The Theft Act applies to all movable property, including cultural objects, as well as intangible assets such as cash. It includes items severed from the land (Theft Act 1968, section 4), such as parts removed from monuments or buried coins. It would therefore comply with the requirement in Article 3 that the offence of theft must apply to movable cultural property.

Property is only capable of being stolen if someone owns it, or has some property interest in it, so that it can be described as 'belonging to another' (Theft Act, 1968 section 5(1)). This requirement is easily satisfied where it is shown that the object has been taken away from the control of another by removing it from a public building or private home. A person who dishonestly digs up an antiquity in England and Wales may also be charged with theft because the antiquity is presumed to belong to the owner or occupier of the land (*Waverley B.C. v Fletcher*, 1995; *Parker v British Airways Board*, 1982) (unless it is treasure which belongs to the Crown[5]). However, the fact that evidence needs to be provided that the cultural object is one 'belonging to another' can cause problems where it has been taken from its state of origin. The domestic law of that country will need to be examined to establish that the object is correctly described as 'stolen.' Governments need laws which assert that someone is the owner (such as the state) of undiscovered cultural objects (such as antiquities or fossils) which lie buried in the ground. Consequently, there is only so much which can be achieved by creating an offence of theft: countries of origin must ensure that they have 'patrimonial' laws in place to assert ownership of buried cultural objects, which is why UNESCO and UNIDROIT encourage states to adopt general provisions on state ownership of undiscovered cultural objects (2012).

[5] For a definition of 'treasure,' see Treasure Act 1996, s 1.

Article 4 – unlawful excavation and removal

Where cultural objects are excavated or forcibly removed from temples, monuments or other structures, their removal not only robs a vulnerable country of information about its history but may partially strip the cultural object of its identity. Information relating to the depth at which an object is buried (stratification) might well have indicated its age for example (Gerstenblith, 2007, p. 171).

Article 4 is a vital addition to the Convention since it requires State Parties to criminalize first the intentional excavation on land and under water to find and remove cultural property without authorisation; second the intentional removal and retention of cultural property excavated without authorisation; and third the unlawful retention of cultural property found in compliance with an authorisation. Unlawful excavation and removal may involve theft but this is not always so. For example, if an owner consents to the removal of cultural property on his land, this may not amount to theft even though the removal may be prohibited by the law of the State. Thus, Article 4 reinforces international cooperation by recognising (administrative) procedures that must be followed to be granted an authorisation to excavate, but does not go beyond this. If a state of origin does not control excavations, then the removal and retention are not unlawful in the country of destination.

In England and Wales, the Dealing in Cultural Objects (Offences) Act 2003 should satisfy Article 4. This statute makes it an offence to dishonestly import, deal in, or be in possession of any 'tainted' cultural object. An object will be 'tainted' where it has been illegally excavated or removed from a building, structure, or monument of historical, architectural or archaeological interest. The phrase 'monument' includes not only caves and excavations but also movable structures such as vehicles, vessels and aircraft.

The 2003 Act is relevant to transnational networks because it applies whether the excavation or removal occurred in England, Wales, or Northern Ireland[6] or elsewhere. It directly affects dealers, auction houses, collectors and others because it applies to those who have dealt with the tainted object or who have arranged or agreed to do so. However, prosecution under the 2003 Act is difficult because it can only be used where it can be proved beyond reasonable doubt that the accused was dishonest and knew or believed that the object was tainted. Even so, as Article 4 of the Convention is only concerned with intentional acts, the 2003 Act would meet its minimum requirements.

Article 5 and 6 – illegal importation and exportation

Articles 5 and 6 of the 2017 Convention oblige State Parties to criminalise illegal or unauthorised import and export of cultural property. These Articles support the 1970 Convention which many states have ratified, including the UK. Article 2 of the 1970 Convention observed that the illicit import, export and transfer of ownership of cultural property was 'one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property.' In these circumstances, it is surprising that the 2017 Convention allows States to reserve the right to provide for non-criminal sanctions in relation to illegal importation. However, the Explanatory Notes to the Convention suggest, at

[6] The Act does not extend to Scotland (s. 6 Dealing in Cultural Objects (Offences) Act 2003).

paragraphs 44 and 50, that non-criminal sanctions should be 'effective, proportionate and dissuasive.'

Article 5 deals with imports, stating that intentional importation of movable cultural property should constitute an offence where the property is stolen, or unlawfully excavated or retained, or unlawfully exported. Article 6(1) provides that each State Party should make it a criminal offence to intentionally export movable cultural property where the exportation is prohibited or unauthorised by its domestic law. The 2017 Convention therefore supports Article 6 of the 1970 Convention which requires State Parties to establish a system to ensure that any cultural object being exported is accompanied by a certificate. Article 20(b) of the 2017 Convention provides further support in adding that State Parties should consider creating 'a system whereby the importation and exportation of movable cultural property are subject to the issuance of specific certificates.' This request is also found in Guideline 9 of the 2014 International Guidelines.

The considerable variation in import and export laws worldwide is troubling. Not every importing country insists upon evidence of an export certificate from a source country and this situation tempts traffickers to channel cultural property through countries with lax import laws. The inconsistencies between the laws of different countries prompted the European Commission to adopt Regulation 2019/880 on the import of cultural goods that provides uniform rules to prevent the import of illicit cultural objects into the EU, such as antiquities from conflict zones. It includes a common definition for cultural goods and a requirement for importers to exercise due diligence regarding the legality of cultural objects brought into the EU. Article 4 requires an import licence for archaeological artefacts over 250 years of any value, for which there is a need to provide evidence of licit export. For objects that are not archaeological artefacts but are over 200 years and above €18,000, Article 5 requires the importer to declare that the goods were legally exported and to give a detailed description of them which includes a document with standardised information describing the object in detail (an 'Object ID'), i.e. an importer statement. As importer statements will be subject to scrutiny, importers will be under pressure to be rigorous in carrying out the due diligence process. The Regulation is now in force in the EU but some of its measures are delayed until 2025. It is expected to lead to the collection and storage of significant amounts of data. It should therefore deter trafficking but it will be at the price of more bureaucracy. Even so, these measures are extremely important: they should reinforce international cooperation against trafficking by standardising import controls, thereby making investigations and prosecutions easier.

In England, tax and customs officers or the police could be involved in relation to law enforcement. For example, any secret import of cultural objects is likely to be in violation of a tax law, such as customs duties and valued added tax (Customs and Excise Management Act 1979, s 170(1)(b)). If an importer or exporter completes a customs declaration, it is a criminal offence if false information is provided under the Customs and Excise Management Act 1979. (Customs and Excise Management Act 1979, ss 167, 168). It is also an offence to make false statements knowingly or recklessly about the provenance of an object in applying for an export licence (Export of Objects of Cultural Interest (Control) Order 2003, Article 4). The police will be involved if unlawfully excavated property is imported or dealt with (Dealing in Cultural Objects (Offences) Act 2003, discussed above) or fraudulent statements are made (Fraud Act 2006). But it could be argued that there is a lack of 'joined up' thinking. For example, there is no absolute bar on importing cultural objects which have been stolen or unlawfully exported (*Attorney General of New Zealand v Ortiz*, 1984; Vigneron, 2014). The UK Government has

not implemented Regulation 2019/880 discussed above (The Introduction and the Import of Cultural Goods (Revocation) Regulations 2021; Granet & Vigneron 2021). If the UK Government were to ratify the Convention, it would be an opportunity to review its current mixture of laws in relation to import and export procedures.

Article 7 - acquisition

Article 7(1) sets out the minimum standard: it is an offence where the person acquiring a cultural object 'knows' that it has an unlawful provenance, such as where it has been stolen, unlawfully excavated or unlawfully imported or exported. In England, the offence of handling stolen goods would satisfy Article 7. The offence is committed where it can be proved that the receipt of stolen objects was dishonest and the accused knew or believed that the objects were stolen (*R v Williams*, 1994). This offence includes those who dishonestly act as assistants for the benefit of another person by helping to smuggle the object into or out of England, or to sell it, or make an arrangement in relation to it (*Theft Act* 1968, s 22.; *R v Tokeley-Parry*, 1999). This offence, and offences under the Dealing in Cultural Objects (Offences) Act 2003, are not committed where a person is merely negligent.

Article 7(2) adds that each Party 'shall consider' making it an offence where the person 'should have known' of the unlawful provenance if 'he or she had exercised due care and attention in acquiring the cultural property.' The UK Government has set a lower standard for special cultural property laws which are designed to protect cultural objects taken from Iraq or Syria[7] or during a period of armed conflict (*Cultural Property (Armed Conflict) Act* 2017, s. 17). It would therefore be able to demonstrate that it had considered a lower standard in compliance with Article 7(2).

Article 7(2) is supported by Article 20(h) that requires State Parties to consider taking measures to ensure that museums that are under their control comply with these rules, including training staff to recognise trafficking and to enquire about the provenance of the object. As regards museums not under state control, Article 20(i) suggests that they should be expected to comply with existing ethical rules on acquisition and report any suspected trafficking to law enforcement authorities. UNODC Guidelines similarly encourage the adoption of codes of conduct, with a particular emphasis on internet sales. In the UK, all museums are expected to comply with the Museums Association's Code of Ethics 2015 (and the ICOM Code of Ethics 2004) and to implement due diligence checks on the provenance of materials, whether for the purpose of acquisitions or loans. In the context of dealers and other stakeholders in the art trade, Article 7(2) is supported by Article 20(c) which requires them to act with due diligence and to record their transactions. This echoes the requirement of due diligence set by the 1995 UNIDROIT Convention that is becoming widely accepted if not as a norm, at least as a goal (Gerstenblith, 2019; Ulph, 2019). In the UK, dealers and auction houses record transactional information which can be provided to the tax authorities (Ulph, forthcoming); and will act with

[7] Iraq (United Nations Sanctions) Order 2003; Export Control (Syria Sanctions) Order 2013/2012, article 12A, as amended by the Export Control (Syria Sanctions) (Amendment) Order 2014 SI No 2014/1896.

due diligence in order to satisfy 2017 money laundering regulations and, to a varying extent, their ethical codes of conduct.

Article 8 – placing on the market

Article 8(1) is concerned with the conduct of intermediaries at the later stages of trafficking. objects. It merely requires States to make it a criminal offence to *knowingly* deal in property which has been stolen, looted or smuggled in or out of a country. This could be criticised as a weak response because dealers can deliberately fail to make enquiries in order to avoid learning details of the provenance of an object. This is why Article 8(2) suggests that governments should consider creating criminal offences based on the lower standard of negligence. In defence of Article 8, it should be noted that Article 1 states that one of the purposes of the Convention is to promote national and international cooperation in combating criminal offences relating to cultural property. The drafters of the Convention would have faced the difficulty that the core criminal offences are rooted in the societal views of each country. In some countries, serious criminal offences have been based for centuries on the idea of knowledge and intention. The Convention is intended to help law enforcement agencies to work together and this may mean creating minimum standards rather than setting out an aspirational agenda,

In any event, Article 8 should be seen in a broader context. Many countries have created money laundering offences which involve a lower standard of proof. A money laundering offence can be committed where there is evidence that the dealer or collector suspected that the object represented the proceeds of crime. The main money laundering offences are concerned with the proceeds of crime from an underlying offence (called a predicate offence) such as theft. The Convention focuses upon the predicate offences, together with those who aid, abet or attempt such offences (Article 9). This is not necessarily a flaw in the Convention because the money laundering regime often remains as a separate regime in domestic law, and includes its own supporting measures, such as monitoring and reporting suspicious dealings. Even so, the relationship between the Convention and money laundering regimes in domestic law is not clear cut. For example, each State Party is expected to consider introducing legislation to require dealers and other stakeholders in the art market to carry out due diligence in their dealings and to record transactions (Article 20(c) and to monitor and report suspicious dealings (Article 20(e). Action along these lines is typically required by a money laundering regime.

Article 9 – falsification of documents

If criminals plan to sell a stolen or looted object on the open market, they will be concerned to disguise how it came to be acquired by creating a false history of ownership. As auction houses and dealers come under increased pressure to carry out due diligence checks due to money laundering legislation, criminals will almost inevitably respond by creating a false provenance for the objects concerned. Article 9 ensures that all State Parties will criminalise the making of false documents and the act of tampering with documents with the aim of presenting the object as having licit provenance. However, it is a weakness of Article 9 that it does not cover oral deception. In contrast, in England and Wales, the Fraud Act 2006 makes it an offence to dishonestly make untrue statements (whether in writing or orally) with the intention of obtaining a benefit or exposing another to a risk of loss.

Article 10 – destruction and damage

Article 10 identifies two types of destruction and damage. The first is the deliberate destruction of cultural property and the second is the destruction or damage caused by the removal of elements of objects (e.g. divide a large painting into smaller sections) or immovable cultural property (severing a sculpture from a temple) with the aim of trafficking them.

The Preamble to the Convention recognised that terrorist groups can be involved in the deliberate destruction of cultural heritage and may also 'use the illicit trade of cultural property as a source of financing.' Destruction of cultural property is often done to assert the authority of the terrorist group and to obliterate inconvenient truths about the past. For example, the Taliban has pursued a policy of destroying pre-Islamic sculptures over a number of years because they were considered idolatrous. This led to the destruction of the Buddhas of Bamiyan in 2001 (Francioni & Lenzerini, 2003). The Buddhas were part of Asia's most important archaeological treasures. The Taliban threatened to blow up the Buddhas in 1997 and eventually they destroyed them. UN Resolution 2001 documented the history of diplomatic intervention from 1997 onwards (UNESCO, 2001, Part I). Like Article 10(1)(b), Resolution 2001 emphasised that efforts to protect cultural property should be allied with the fight to curb the illicit trade in cultural property (UNESCO, 2001, Part III).

The tragic destruction of the Buddhas of Bamiyan was subsequently recalled in the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage 2003. Paragraph 1 of this Declaration encouraged all States to take 'all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage.' Article 10(1)(a) reflects the views of UNESCO. Article 10(1)(a) is immensely important because of the continuing threat to cultural property due to armed conflicts in the last decade. For example, many of Syria's cultural heritage sites (such as Aleppo, Raqqa and Palmyra) have been damaged or all but obliterated due to fighting or terrorist activity (Danti 2015). A significant terrorist group in this region was ISIS (Islamic State in Iraq and the Levant) which imposed its ideology between 2014 and 2019 in parts of Syria and Iraq. It was responsible for the widespread destruction of religious sites, monuments and artefacts; the group also organised the looting of antiquities to generate a revenue stream to fund its activities (Schindler & Gautier 2019; Almohamed, 2021). These terrorist activities have been met with universal condemnation. In UN Resolution 2347 of 2017, the Security Council deplored the unlawful destruction of cultural heritage by terrorist groups during armed conflict. It noted that acts of destruction could be viewed as war crimes and pointed to the decision of the International Criminal Court in 2016 to convict Ahmad Al Faqi Al Mahdi because he had been involved in the destruction of cultural property in Timbuktu in Mali in 2012 (*Prosecutor v Al Faqi Al Mahdi*, 2016*;* Wierczynska & Jakubowski, 2017). This was the first resolution to focus solely upon the protection of cultural heritage, treating this issue as a matter of international peace and security (Jakuboswki, 2018).

Despite the importance of Article 10(1), Article 10(2) enables States to declare that they reserve the right not to apply it or to only apply it in specific cases. This provision is helpful as there may be situations where Article 10(1) should not be applied. The most obvious situation is where an artist wishes to destroy some of his or her own work in order to curate his or her legacy. Another possibility is that destruction is part of the creative act of the artist. For example, Banksy arranged for his painting "Girl with a Balloon' to be shredded at auction.

Commented [Office2]: Intention was to fully shred it according to Banksy: https://news.sky.com/story/banksy-reveals-he-meant-to-shred-entire-1m-girl-with-balloon-painting-11528598

Commented [UJ(3R2]: The link no longer works but I think that this sentence, as amended, works well. Thank you for the amendment

Supplementary provisions

The main offences are supported by further measures. These include matters such as jurisdiction, sanctions, the presence of aggravating factors, preventive measures, and

international co-operation. In addition, Article 20 provides a list of other positive actions, such as keeping inventories up to date, introducing import and export control procedures, adopting due diligence provisions for intermediaries and establishing a central national inventory. They are designed to encourage co-operation between states and to facilitate law enforcement.

Concluding remarks

The Convention on Offences relating to Cultural Property 2017 appeared timely. There had been increasing interest in the role which the criminal law might play in protecting cultural property. Less than two months before, UN Security Council Resolution 2347 had called for Member States to develop broad law enforcement and judicial cooperation in countering trafficking in cultural property.[8] The Resolution urged States to introduce measures into their domestic laws to combat trafficking in cultural property and to consider designating acts involving trafficking as serious crimes punishable by imprisonment for at least four years.[9]

The Convention should have been attractive to most governments because it sets minimum standards. Thus, the main criminal offences require the prosecution to prove intention on the part of the accused; States merely have a duty to 'consider' a lower standard. In relation to certain offences, there are statements that a State Party could substitute an administrative penalty instead. There are also statements that a State Party can reserve its position on certain issues. Furthermore, although the Convention is innovative in focusing upon criminal law in relation to protecting cultural property, it complements current international conventions, building on what exists rather than creating new rules (for example in the definition of cultural property). It also reinforces the regional European framework of protection, adding to existing EU directives and regulations on the protection of cultural property. Its main aim is to strengthen cooperation at the international level, which should be universally welcomed.

The low number of signatures and ratifications to date is therefore surprising. One reason might be its timing. The Covid pandemic has gripped the world since 2020. Governments might have decided that, as the Convention does not break new ground, they can prioritise other matters. In relation to economic crime, governments may well have preferred to focus upon tackling money laundering instead. EU countries, for example, were required to extend the money laundering regime to all businesses selling works of art to satisfy the Fifth Anti-Money Laundering Directive 2018/843.

There might also be a concern that the finer details of the Convention might mean that domestic laws must be amended. For example, the definition of 'cultural property' might cause difficulties for some States even though the drafters followed the definition in the 1970 Convention. The definition provides that the movable or immovable must be listed by the State. The difficulty is that the list of cultural property will change from one state to another. This variation might not be important to anyone relying upon the UNESCO Convention because it was concerned with the civil law and administrative matters. In contrast, the 2017 Convention deals with criminal offences. Criminal laws need to be precise because committing an offence may lead to imprisonment. Furthermore, making any changes to core criminal laws can be

[8] UN Security Council Resolution 2017/2347 at [11].

[9] Ibid at [9]. In relation to the definition of 'serious' crimes, see UNTOC 2000, Article 2.

problematic because these laws may have existed for centuries and there may be societal opposition to change.

It could be argued that setting minimum standards is not enough and that the Convention should have been more ambitious in emphasising the need for due diligence. The advantage of due diligence is that it is becoming a standard that is better understood, defined in the UNIDROIT Convention, in the 2014/60 European Directive, and in ethical codes of conduct for museums and dealers. A due diligence standard is desirable because it can deter reckless dealings at the last stages of the trafficking process. However, setting minimum standards creates flexibility. It allows governments to adapt their responses to the particular context as crime is also dependent on its location and the economic and socio-legal context (Campbell, 2013). It enables governments to respond as appropriate, taking account of their resources. In particular, some governments have not drawn up complete inventories of their important cultural objects due to problems with resources (Vigneron, forthcoming).

The Convention has a number of strengths. It fills a gap in creating an international document which focuses upon the criminal law. Criminal law has an important role to play: the risk of imprisonment is a genuine deterrent, and a conviction of an offence makes it clear that the accused has been involved in wrongdoing. It identifies core offences (theft, unlawful excavations, illicit export and import, fraud and destruction) and brings them together in one Convention. It deals with every stage of trafficking from the original theft or looting to subsequent movement of goods and sales and purchases. Although there have been relatively few ratifications to date, the position may change. The aim of the Convention is to promote national and international co-operation in relation to criminal offences. If it succeeds, it will deserve praise because criminal laws are only effective when they can be enforced (Brodie & al., 2021).

It can be argued that, in focusing upon the criminal law, the Convention helps to educate stakeholders in the art market who might be tempted to brush aside any concerns about illicit trading. It confronts the problem that 'antiquities dealers, while they often give lip service to the protection of cultural heritage, cannot be expected to be enthusiastic about pushing a market strategy that will so radically change (and potentially reduce) buyer purchasing' (Polk, 2009, p 22). Stakeholders therefore need to understand why they must be vigilant. If they do not understand, then a concern to make profits will seduce some people (such as dealers); and others (such as palaeontologists, archaeologists) might be tempted to throw caution to the winds in order to obtain a prime specimen.

The Convention helps to grow international law in the fight to protect cultural property. The conventions, resolutions, codes of conduct and guidelines adopted by different UN organisations, public and private stakeholders such as museums and art dealers reinforce each other and contribute to the development of a new branch of international law, international cultural heritage law. A multi-faceted approach is needed to fight the trafficking of cultural property. International conventions in this field need widespread ratification, correct implementation at the domestic level, and the development of soft law instruments in collaboration with art market stakeholders. A change in behaviour through public campaigning at the different stages of the circulation of cultural property, from their origin to their destination, including the good collector, is required to adequately address the trafficking in cultural property.

References

Almohamed, A. (2021). The destruction and looting of cultural heritage sites by ISIS in Syria: The case of Manbij and its countryside. *International Journal of Cultural Property*, *28*(2), 221 – 260. https://doi.org//10.1017/S0940739121000114

Attorney-General of New Zealand v Ortiz [1984] AC 1 (CA).

Borgstede, G. (2014). Cultural property, the Palermo Convention, and transnational organized crime. *International Journal of Cultural Property*, *21*(3), 281-290. https://doi:10.1017/S0940739114000125

Brodie, N., & Tubb K. (2002). *Illicit antiquities: The theft of culture and the extinction of archaeology*. Routledge.

Brodie, N., Kersel, M. M., Mackenzie, S., Sabrine, I., Smith, E., & Yates, D. (2021). Why there is still an illicit trade in cultural objects and what we can do about it. *Journal of Field Archaeology*, *47*(2) 117-130. https://doi.org/10.1080/00934690.2021.1996979

Campbell, P. B. (2013). The illicit antiquities trade as a transnational criminal network: Characterizing and anticipating trafficking of cultural heritage. *International Journal of Cultural Property*, *20*, 113 – 153. https://doi.org//10.1017/S0940739113000015

Collins, L., Dicey, A. V., & Morris, J. H. (2012). *Dicey, Morris and Collins on the Conflict of Laws* (15th ed.). Sweet & Maxwell.

Committee on Offences Relating to Cultural Property. (2016). European Committee on Crime Problems (CDPC), Background paper on the Council of Europe Convention on Offences Relating to Cultural Property.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954.

Convention on Offences relating to Cultural Property, June 23, 1985 (ECTS 119)

Convention on Offences relating to Cultural Property, May 3, 2017 (ECTS 221).

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 14 November, 1970.

Danti, M. (2015). Ground-Based Observations of Cultural Heritage Incidents in Syria and Iraq. *Near Eastern Archaeology*, *78*(3). https://doi.org/10.5615/neareastarch.78.3.0132

The European Parliament and the Council of the European Union. (2014). Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast). *Official Journal of the European Union*, 1 – 10.

Commented [AA4]: Since these are the editors but not the authors of the chapter(s) used in this article, then it is necessary to adjust this by including the author(s) names instead.

Commented [UJ(5R4]: Thanks. They are co-writers. I have deleted the word "eds."

Commented [AA6]: Need to include the page number here.

Commented [UJ(7R6]: It is a general reference to the theme of a co-written book and this is why I did not provide a page number.

Francioni, F., & Lenzerini, F. (2003). The Destruction of the Buddhas of Bamiyan and international law. *European Journal of International Law*, *14*(4), 619 – 651. https://doi.org/10.1093/ejil/14.4.619.

Gerstenblith, P. (2007). Controlling the international market in antiquities: Reducing the harm, preserving the past. *Chicago Journal of International Law*, *8*(1), 169 – 195. https://www.proquest.com/scholarly-journals/controlling-international-market-antiquities/docview/237217976/se-2?accountid=41635

Gerstenblith, P. (2019). Provenances: Real, fake, and questionable. *International Journal of Cultural Property*, *26*(3), 285 – 304. https://doi.org/10.1017/S0940739119000171

Granet, V. & Vigneron, S. (2021). The impact of Brexit on heritage: Impeding workers' mobility and European cooperation in the fight against the trafficking of cultural objects and endangered species. *Art, Antiquity & Law*, *26*(4), 277 – 297.

Interpol (2021). 2020 Assessing crimes against cultural property: Survey of Interpol member countries.

Jakubowski, A. (2018). Resolution 2347: Mainstreaming the protection of cultural heritage at the global level. *Questions of International Law, Zoom-In*, *48*, 21 – 44.

Mackenzie, S., & Davis, T. (2014). Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network. *British Journal of Criminology*, *54*(5), 722 – 740. https://doi.org/10.1093/bjc/azu038

Mackenzie, S., & Yates, D. (2020). Researching the structure of the illicit trade. In A. Tompkins (Ed.), *Provenance research today, principles, practice, problems* (pp. 162). Lund Humphries.

Parker v British Airways Board [1982] QB 1004 (CA).

Passas, N. & Bowman Proulx, B. (2011). Overview of crimes and antiquities. In S. Manacorda, & D. Chappell (Eds.), *Crime in the art and antiquities world: Illegal trafficking in cultural property* (pp 51). Springer.

Polk, K. (2009). Whither Criminology in the Study of the Traffic in Illicit Antiquities? In S. Mackenzie, & P. Greene (Eds.), *Criminology and archaeology: Studies in looted antiquities* (pp. 13-26). Hart publishing.

Prosecutor v Al Faqi Al Mahdi (Judgment and sentence) ICC-01/12-01/15-171 (27 September 2016).

R v Tokeley-Parry 1999] Crim LR 578 (CA).

R v Williams [1994] Crim LR 934 (CA).

The Council of European Union. (2008). Regulation (EC) 116/2009 of 18 December 2008 on the export of cultural goods (Codified version). *Official Journal of the European Union*,39, p. 1–7.

The European Parliament and the Council of the European Union. (2019). Regulation (EU) 2019/880 of 17 April 2019 on the introduction and the import of cultural goods 2019. *Official Journal of the European* Union p. 151.

Renfrew, C. (2000). *Loot, legitimacy, and ownership: The ethical crisis in archaeology*. Duckworth.

Roucounas, E. (1984). General Report. *International legal protection of cultural property: proceedings of the thirteenth Colloquy on European Law, Delphi, 20-22 September 1983*. Council of Europe.

Schindler, H. & Gautier, F. (2019). Looting and smuggling of artifacts as a strategy to finance terrorism global sanctions as a disruptive and preventive tool. *International Journal of Cultural Property, 26*(3), 331 – 342. https://doi.org/10.1017/S0940739119000225

Second Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. (2012). (No. C70/12/2.MSP/INF.2).

Ulph, J. (2019). Legal perspectives on heritage crime, reviewing due diligence measures for the art market. In V. Mitsilegas, S. Hufnagel & A. Moiseienko (Eds.), *Research handbook on transnational crime* (pp. 356). Edward Elgar.

Ulph, J. (forthcoming). Commentary article 10. In A. Chechi, A. Jakubowski & A. F. Vrdoljak (Eds.), *Commentary on the 1970 Convention and 1995 Convention*. OUP.

UN ECOSOC. (2004). Resolution 2004/34: Protection against Trafficking in Cultural Property.

UNODC. (2015). UN Resolution 69/196 International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences UN General Assembly (69th session) A/RES/69/196.

UNESCO. (2001) 'Acts Constituting "A Crime against the Common Heritage of Humanity"' Doc WHC-01/CONF.208/23, 22 November 2001.

UNESCO. (2013). *The Fight Against the Illicit Trafficking of Cultural Objects; The 1970 Convention: Past and Future; Information Kit.*

UNIDROIT. (2012). Model Provisions on State Ownership of Undiscovered Cultural Objects.

Commented [AA8]: Need to confirm with the author whether UNESCO would be considered as the author of this meeting. If yes, we need then to insert it here as the author.

Commented [SV9R8]: It is not UNESCO, not all members of UNESCO are states parties to the 1970 Convention

UNODC. (2016), *Practical Assistance Tool to assist in the implementation of the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences.*

UNODC. (2020). Resolution 10/7: Combating Transnational Organized Crime against Cultural Property.

UNODC. (2010). *Use of the United Nations Convention against Transnational Organized Crime for protection against trafficking in cultural property: Note by the Secretariat.* (No. CTOC/COP/2010/12).

UNSC Resolution 1483 (2003). Situation between Iraq and Kuwait UNSC S/RES/1483.

UNSC Resolution 2085 (2012). Mali UNSC S/RES/2085.

UNSC Resolution 2100 (2013). Mali UNSC S/RES/2100.

UNSC Resolution 2199 (2015). Threats to international peace and security caused by terrorist acts UNSC S/RES/2199.

UNSC Resolution 2322 (2016). Threats to international peace and security caused by terrorist acts UNSC S/RES/2322.

UNSC Resolution 2347 (2017). Maintenance of international peace and security UNSC S/RES/2347.

UNSC Resolution 2462 (2019). Threats to international peace and security caused by terrorist acts: Preventing and combating the financing of terrorism UNSC S/RES/2462.

UNSC Resolution 2597 (2021). Threats to international peace and security S/RES/2597.

Vigneron, S. (2014). Protecting Cultural objects: Enforcing the illicit export of foreign cultural objects. In V. Vadi, & H. Schneider (Eds.), *Art, cultural heritage and the market, ethical and legal issues* (pp. 117). Springer.

Vigneron, S. (forthcoming). Commentary article 5(b). In A. Chechi, A. Jakubowski & A. F. Vrdoljak (Eds.), *Commentary on the 1970 Convention and 1995 Convention*. OUP.

Waverley B.C. v Fletcher [1995] QB 334 (CA)

Wierczynska, K., & Jakubowski, A. (2017). Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al Mahdi Case. *Chinese Journal of International Law, 16*(4), 695 – 721https://doi.org/10.1093/chinesejil/jmx029